

**Office of Chief Counsel
Internal Revenue Service**
memorandum

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to: Thomas J. Ryan
Director
Service Wide Interest Program
(SBSE)

from: Blaise G. Dusenberry
Senior Technical Reviewer, Branch 1
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subject: Section 6603 remittances

This responds to a series of questions related to section 6603 remittances. This advice may not be used or cited as precedent.

You originally asked about complex interest computations involving overpayments that were later designated as section 6603 remittances, and then converted to payments, prior to an assessment.

You then followed up with a question about the relationship between Rev. Rul. 2007-51 and Rev. Proc. 2005-18.

You later provided multiple taxpayer-specific fact patterns involving taxpayers dumping remittances on the government.

LAW

The 2004 American Jobs Creation Act added section 6603 to the Code. Sections 6603(a) and (d) allow a taxpayer to make a designated interest-bearing cash deposit for a potential future payment of tax, which has not been assessed at the time of deposit. The deposit amount must not be greater than "taxpayer's reasonable estimate" of the amount of any tax attributable to disputable items. Section 6603(d)(2). Effectively, the making of the cash deposit provides the taxpayer with relief from the accrual of section 6601 underpayment interest.

Rules for the administration of section 6603 are set forth in Rev. Proc. 2005-18, 2005-1 C.B. 798. Section 4.02 of Rev. Proc 2005-18, Treatment of deposits made during an examination upon the completion of such examination by the Service, provides that

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upon completion of an examination, if a taxpayer agrees to the full amount of the deficiency “an assessment will be made and any deposit will be applied against the assessed liability.” Section 4.02(3) provides that “a taxpayer may elect to have a deposit that exceeds the amount of tax ultimately determined to be due applied against another assessed or unassessed liability.” Read in conjunction with section 4.02(1), it is clear that this option is only available after the taxpayer has agreed to the assessment. Section 4.02(3) also specifies that the request to apply the excess deposit to another assessed or unassessed liability “must be in writing.” Therefore, the taxpayer can only “convert” a section 6603 deposit to a payment by agreeing to the assessment of the specific liability that the deposit was made to satisfy.

The concept that the only way the taxpayer can “convert” a remittance is by agreeing to an assessment was recently articulated by the district court for the Eastern District of Michigan. Ford Motor Company v. United States, 2010 U.S. Dist. LEXIS 54987. In Ford, the taxpayer made cash bond deposits with respect to various tax years, a portion for which the taxpayer had already received 30-day letters. The taxpayer subsequently agreed to the assessment and requested that the IRS treat the remittances as advance payments for those years. Upon its determination that the taxpayer had overpaid those years, the Government refunded the excess with interest, but did not pay any interest from the date of the remittance through the date of the advance payment. The court rejected the taxpayer’s argument that sections 6601 and 6611 must be read symmetrically such that the date of payment in section 6601 refers to the date of remittance. Instead, the court followed the Sixth Circuit in concluding that a remittance is only considered “paid” when it is applied to an assessment. See Ameel v. United States, 426 F.2d 1270 (6th Cir. 1970).

Although Ford’s conclusion that the taxpayer is not entitled to additional interest is based on the pre-section 6603 framework (Rev. Proc. 84-58), the concept applies to the current framework (i.e., no overpayment interest accrues from remittance date to payment date – only section 6603 interest would accrue during this time period). Ford also explains that in order to obtain a refund of an overpayment “the taxpayer must follow certain refund procedures.” This is distinct from the procedures articulated in Rev. Proc. 2005-18 that a taxpayer must follow in order to request an excess section 6603 deposit.

Rev. Rul. 2007-51, 2007-2 C.B. 573, holds that pursuant to authority under section 6402, the Service may credit an overpayment against unassessed liabilities that have been determined in a notice of deficiency sent to the taxpayer. Rev. Rul. 2007-51 does not apply to an excess section 6603 deposit because an excess section 6603 deposit is not an overpayment. Once a section 6603 deposit generates excess, that excess should either be returned to the taxpayer with section 6603 interest, or should be applied as a section 6603 deposit against another liability. The excess should be considered available as of the date the remittance is applied to that other liability, and only if the Rev. Proc. 2005-18 procedures are satisfied with respect to the excess.

ANALYSIS

These concepts can be illustrated by the following examples you provided:

1. [REDACTED]

The taxpayer's [REDACTED] return reflected an overpayment, which the Service refunded to the taxpayer. The taxpayer returned the refund to the Service, and the Service credited the taxpayer's [REDACTED] account in the amount of the overpayment. The following year, the taxpayer requested that the Service convert the overpayment to a section 6603 deposit with respect to liabilities for the [REDACTED] and [REDACTED] tax years. After the [REDACTED] and [REDACTED] years were assessed, excess section 6603 deposits remained on those accounts. The taxpayer requested that these excesses be used to pay the [REDACTED] liability.

The first issue with this fact pattern is the Service's crediting the taxpayer's [REDACTED] account in the amount of the overpayment, contrary to any apparent authority. Since there is no indication that the remittance was attributable to a disputable tax for year [REDACTED], the taxpayer should not have been allowed to return the overpayment and should not earn interest on this amount. The next problem is that the taxpayer asked to "convert" an overpayment to a deposit for different liabilities. As discussed above, the Service has section 6402 authority to apply overpayments to outstanding liabilities. Taxpayers cannot assume this authority by directing the Service to "convert" overpayments to remittances. Furthermore, even if the Service allowed the taxpayer to do so, the section 6603 deposit (assuming its designation complied with the required Rev. Proc. 2005-18 procedures) should apply as of the date the amount was converted. The excess section 6603 deposits remaining after the [REDACTED] and [REDACTED] assessments can be used to pay the [REDACTED] liability, but the "availability date" of this amount should be the due date of the [REDACTED] return. The taxpayer is not entitled to any section 6603 or overpayment interest on the excess because the initial overpayment, which was later converted to a deposit, was not attributable to a disputable tax.

In order to avoid this problem in the future, we recommend that the Service refuse to accept remittances that are not designated in compliance with Rev. Proc. 2005-18. In the case of an overpayment, any refund should be returned to the taxpayer, and he should remit a new check with a designation statement and a calculation of disputable tax required by Rev. Proc 2005-18. This would avoid situations where the Service is holding "unremitted" or "undesignated" sums of money. Should the Service continue to accept such "failed" section 6603 remittances, although they will stop the accrual of underpayment interest, they should not accrue section 6603 or overpayment interest.

2. [REDACTED]

Taxpayer made a section 6603 remittance on May 15, 2006, that complied with Rev. Proc. 2005-18. On January 18, 2007, the taxpayer requested that the remittance be "applied in payment of the amounts assessed"; however, the taxpayer did not sign a waiver of the restrictions on assessment, so the assessment was not made until August 13, 2007. Several years later, the Service processed partial tax decreases of the

assessments, which resulted in refunds to the taxpayer. The Service paid section 6603 interest on these amounts from the date of deposit to the date of refund. The taxpayer argues that it should accrue overpayment interest from the requested conversion date to the refund date.

The Service's treatment is correct. As discussed above, an excess section 6603 deposit, resulting from the subsequent abatement of tax, is not an overpayment. Instead, the excess retains its character as a section 6603 deposit. Furthermore, it is the Service's position that the "payment" date is the date the Service applies the remittance as a payment, not the date the taxpayer so requests. This is consistent with the Ford opinion discussed above.

3. [REDACTED]

Taxpayer made a series of section 6603 deposits in [REDACTED] for tax years [REDACTED]. Before the taxpayer agreed to the proposed assessments, taxpayer requested that the remittances be reallocated; however, the reallocation request did not comply with Rev. Proc. 2005-18 because it did not include a disputable tax calculation. Despite the taxpayer's failure to comply with Rev. Proc. 2005-18, the service processed the reallocation request, which directed the Service to move all the earliest section 6603 deposits to the [REDACTED] year (the taxpayer had initially made deposits to [REDACTED] and [REDACTED] on the same date in [REDACTED]). Although reallocated, the deposits retained their initial remittance date.

Once the complex interest team received the case, it verified the true disputable tax amounts and refunded all of the overpayments, but only computed section 6603 interest on amounts that were attributable to disputable tax. The taxpayer argues that he should receive interest on all the overpayments, and that the underpayment interest on the [REDACTED] year should have been lower because the Service should have used its section 6402 authority to offset the earliest liabilities first.

The Service could not have exercised its section 6402 authority in this scenario because after applying the section 6603 deposits to the assessments, no liabilities remained on any of the years (the section 6603 deposits exceeded the liability) and the excess section 6603 deposits are not overpayments. Furthermore, the taxpayer cannot direct the Service to exercise its section 6402 authority; the Service "may" credit an "overpayment." Therefore, the taxpayer is only entitled to interest on the excess section 6603 deposits attributable to a disputable tax.

CONCLUSIONS

An excess section 6603 deposit is not an overpayment. Therefore, the Service may not unilaterally credit the excess section 6603 deposit to an outstanding liability and Rev. Rul. 2007-51 does not control section 6603 deposits.

The Service should require strict compliance with Rev. Proc. 2005-18. If a taxpayer requests that an excess deposit be applied to another liability, pursuant to section 4.02(3), the Service should process that new section 6603 deposit only if it is in writing and accompanied by the disputable tax calculation. The date of that deposit should be the later date that the service “converts” the excess to a new deposit with respect to the new liability.

Overpayments may not be converted to section 6603 remittances. If the taxpayer does not have a liability to which the Service may credit the overpayment, the Service should refund the overpayment to the taxpayer. The taxpayer may then designate a section 6603 deposit, in compliance with Rev. Proc. 2005-18 via a new check. Although it would be administratively convenient for the taxpayer to simply “convert” the overpayment to a designated remittance, the Service is not required to do this. The Service is also not required to comply with taxpayer requests to “reallocate” section 6603 remittances. We do not recommend that the Service do so because conversion and reallocation cause significant administrative confusion.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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Please call 202-622-4910 if you have further questions.